

Pages 1 - 53

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE JUDGE

JOHN DOE #1 AND JOHN DOE #2,)	
)	
Plaintiffs,)	
)	
VS.)	No. C 21-485 JCS
)	
TWITTER, INC.,)	
)	
Defendant.)	
_____)	San Francisco, California
		Friday, August 6, 2021

TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR

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(Appearances continued on next page)

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Official Reporter - U.S. District Court

APPEARANCES: (via Zoom Webinar; continued)

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BY: MICHAEL G. RHODES, ESQ.

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Friday - August 6, 2021

9:38 a.m.

P R O C E E D I N G S

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THE CLERK: We are calling case number 21-cv-0485, Doe versus Twitter. Counsel, please raise your hands.

Appearances, please, first, starting with the plaintiffs.

MR. MATIASIC: Good morning, Your Honor. Paul Matiasic on behalf of the plaintiffs.

MS. HABA: Good morning, Your Honor. Lisa Haba on behalf of the plaintiffs.

THE COURT: Good morning.

MR. GENTALA: Good morning, Your Honor. Peter Gentala on behalf of the plaintiffs.

THE COURT: Good morning.

MS. MOHR: Good morning, Your Honor. Hannah Mohr also on behalf of the plaintiffs.

THE COURT: Good morning.

THE CLERK: And for the defendants.

MR. RHODES: Good morning, Your Honor. Michael Rhodes, of Cooley, on behalf of Twitter. Nice to see you.

THE COURT: Good morning. Good to see you.

MR. WONG: Good morning, Your Honor. Kyle Wong, of Cooley, on behalf of the defendant.

THE COURT: Good morning.

MR. WONG: Good morning.

1 **THE COURT:** So thank you, all.

2 On the motion to dismiss, obviously, I've read your briefs
3 on it. And the matter is not uncomplicated, but I do
4 appreciate all the work you put into it.

5 I had a few questions that I want you to address
6 specifically. I'm not going to hide the ball; I'll tell you my
7 tentative ruling. But, most importantly, I want you to address
8 the following questions when you talk to me because they are
9 questions on which I don't have a firm answer, I would say.

10 The first two questions are related, and it's the question
11 of -- I guess I'll put them this way, to address the question
12 of whether what occurred here, posting child pornography, at
13 least that's how its pled, on Twitter is sex trafficking under
14 the statute.

15 You know, we're talking about a TVPRA claim. Is it --
16 whether the defendant participated in a venture or benefited
17 from an venture or whatever it is that would cause plaintiffs
18 to engage in a commercial sex act, and does this qualify as a
19 commercial sex act or something that would cause a plaintiff
20 to, and the related question of whether or not the plaintiffs
21 have adequately or can adequately allege that this, whatever it
22 was, would cause the victims to engage in a commercial sex act
23 within the meaning of the statute.

24 Obviously, it's horrible, and what happened to these kids
25 should never happen and is unforgivable, and we should all do

1 whatever we can to make sure it doesn't happen to anyone else.
2 But the question -- the narrow question is whether this is
3 related to the commercial sex act requirements under the
4 statute, number one.

5 Number two is, I want you to address here the question
6 that's raised in the *Kik* case and other cases about whether
7 FOSTA's including of the language *if the conduct underlying the*
8 *claim constitutes a violation of 1591* limits or changes the
9 *mens rea* of 1595. Key issue.

10 You've addressed it some in your briefs, and I'd like to
11 have some discussion today about it. But I wanted to throw out
12 the idea that if that was what someone wanted to do, this is a
13 pretty opaque way of doing it.

14 It's not obvious to me that that's what Congress intended,
15 and maybe a more natural reading of the statute is that, with
16 respect to 1595, Congress wanted to limit the immunity
17 exception to claims based on 1595 -- brought under 1595, which
18 were based on 1591, and did not intend to extend that immunity
19 to other claims brought under 1595, because that statute allows
20 for civil claims based on any sections within the chapter. And
21 there are lots of sections in the chapter; peonage, slavery,
22 transportation of -- you know, lots of things that don't have
23 to do with sex acts.

24 But that's one -- I wanted you to -- since you addressed
25 that some in your brief and I had this possible way of

1 interpreting, I wanted you to address that.

2 Next I want you to address -- and I'm not sure it's
3 directly germane, because this is a pleading motion, but I'm
4 interested in the relationship between viewings and re-tweets
5 and ad revenue for Twitter.

6 So my tentative is as follows: As to the TVPRA, I don't
7 think there's a claim for direct sex trafficking. It was a
8 lovely argument to try to make, but I think that's obviously
9 not correct here.

10 On the claim under TVPRA, under (a)(2), which requires a
11 knowing benefit from participation in a venture engaged in sex
12 trafficking, knowing the person was involved as a minor and
13 caused to engage, et cetera, et cetera, my tentative thought is
14 that that claim survives.

15 And it is my thought for a couple of reasons. One is, I
16 think the -- because you can tell from my previous suggestion
17 that I think the *knew or should have known* standard of 1595 is
18 the relevant *mens rea* here and that given the proceedings
19 there's sufficient allegation, subject to our discussion about
20 what constitutes a commercial sex act.

21 In terms of participation in a venture, you know, since
22 I'm using the *knew or should have known*, it's not about
23 satisfying the criminal code or putting up an overt act or any
24 of those sorts of things. It's about sufficient allegations to
25 infer that there was tacit agreement one way or another to

1 allow this to continue.

2 And there are many allegations about that. Enabling sex
3 trafficking by making it hard to report; permitting a large
4 amount of it to occur. The allegation is there's an ability to
5 monitor it, and they still let it happen.

6 In this particular case there's no question that Twitter
7 was repeatedly told about this exploitation. I mean, this is a
8 unique -- maybe it's not unique, but there's a set of facts
9 here that make this case plausible. And that is, Twitter was
10 repeatedly told about this exploitation, in great detail, and
11 first failed to remove it then refused to remove it, and
12 delayed removing it even after the Department of Homeland
13 Security was called. You know, even though one of the accounts
14 was posted -- the post of the video was subject to a prior
15 complaint, the content is the content, but the allegation is
16 it's obvious child porn. So, you know, these repeatedly
17 ignoring or denying requests suggests that they knew or should
18 have known that they were participating in a venture that was,
19 if this is commercial sex act, satisfying participation in a
20 venture.

21 The benefits -- you know, the benefits is an interesting
22 question. And I will say, with respect to all of this, I'm
23 thinking about this as a pleading motion, of course, and I
24 don't have a preconceived idea about where this comes out to if
25 and when we get to a summary judgment motion, of course. And

1 the receipt of a benefit is a particular example of that.

2 I mean, there's all sorts of things pled about the
3 benefits received, you know, and the views and re-tweets and
4 bringing up advertisements and all sorts of things. You know,
5 they've certainly pleaded, you know, increase in advertising
6 and users, and that sort of thing, which would be benefits
7 under the statute. And then so, you know, with those
8 conclusions, I think it fits within the statute of both FOSTA
9 and 1595.

10 On the other hand, I think all the other remaining claims
11 are barred. There's no prior cause of action under 2258A and B
12 of the criminal code.

13 As to the other claims, they're all founded on the idea
14 that this content posted on a website caused an injury and that
15 without the content there would be no injury, and that they
16 should have done something or structured their platform
17 differently to make sure the content didn't show up so easily.

18 Whatever it is, it's all about the content. And it
19 doesn't matter whether you're putting -- talking about putting
20 it up or taking it down or it's contraband or whether the flaw
21 in that platform makes it easy to put up or difficult to
22 challenge or difficult to take down it seems to me that all the
23 claims are barred by 203 under that -- with respect to that.

24 But that's my tentative. And I think that what -- I'm
25 particularly interested in your thoughts on the first few

1 things I talked about, and I'll first turn to the moving party.

2 **MR. RHODES:** Good morning, Your Honor. May I be
3 heard?

4 **THE COURT:** Yes, of course.

5 **MR. RHODES:** Thank you. For the court reporter's
6 benefit, I'm Michael Rhodes representing Twitter.

7 So, Your Honor, my analysis would take us this way. Let's
8 take a look, for a second, at 230 subsection (e), because I
9 think within the architecture of that statute we will find the
10 answer to what claim, under this particular pattern of facts,
11 can go forward and what the elements of the claim is.

12 If you take a look at (c)(1), which states no effect on
13 criminal law, you see in the *Gonzalez versus Google* case, at
14 page 890, they say that's limited to criminal prosecutions.
15 Then we go to Section 5, which talks about the trafficking
16 laws, and there are three subsections; capital A, capital B and
17 capital C.

18 I note that capital B and C are specifically constrained
19 to criminal prosecutions. And it was interesting to me to look
20 at subpart B because the carve-out for criminal prosecutions
21 under state law again cites to a charge, quote, that would
22 constitute a violation of Section 1591, not 1595. So they
23 limited the state law criminal remedy what -- meeting the
24 elements of 1591.

25 And, of course, our argument -- and I understand what the

1 Court's position is, but our argument is that if you look at
2 the text of subpart A, the only claim against an electronic
3 computer service under 230 that is allowed to survive is one
4 that meets the definitions under 1591.

5 1595 is the more omnibus civil remedy provision. And if
6 you look at that *Kik* case, recognizing it's not controlling but
7 it's another case under a similar fact pattern out of Florida,
8 what the court says there is 1595 will apply to offline
9 behavior, like the hotel cases that the parties cited, and when
10 you're dealing with an online interactive computer service, as
11 we are here, the only claim that can go forward is 1591.

12 And so you're allowed to bring the claim under 1595, but
13 you have to meet the strictures and elements of 1591. And I
14 think that there are four elements that are required for a 1591
15 claim.

16 **THE COURT:** Can I --

17 **MR. RHODES:** Yes.

18 **THE COURT:** Obviously, that was a piece that I wanted
19 to talk about, just what you just said.

20 **MR. RHODES:** Yes.

21 **THE COURT:** I want to ask you a little bit about it
22 because they didn't say for claims that you have to -- they
23 didn't say that they meant to change the elements of a claim
24 under the civil statute, 1595, which is the vehicle by which
25 you're allowed to bring a 1591 claim. They didn't say that.

1 Your point is that they indirectly said it by having -- by
2 saying so long as, et cetera, et cetera.

3 I'm wondering why I should -- they could just -- they
4 could have said something different. They could have said:
5 And we mean, and, therefore, we're abrogating the 1595 to the
6 extent that it's inconsistent with the elements of 1591,
7 because it is. I mean 1595, a case brought under 1595 doesn't
8 have to show, even though it's based on 1591, the same
9 *mens rea*. It seems like an odd way to do it to me.

10 And why isn't my reading of it a more natural reading,
11 that there are lots of different claims you could bring against
12 an Internet service provider based under 1595, but they only
13 wanted you to be able to bring this one because they were
14 particularly concerned, and that's the one thing we can agree
15 about the legislative history, about sex trafficking, not, you
16 know, the other forms of -- abhorrent forms of -- that's kind
17 of redundant, abhorrent forms of slavery that occur.

18 Why doesn't that make more sense?

19 **MR. RHODES:** I think there are two answers, Your
20 Honor.

21 First, the express language of subpart A, and let's parse
22 it. The first clause says *Any claim in a civil action brought*
23 *under 1595 of this title*. Title 18. If you put a period
24 there, I think the Court's reasoning might obtain. But there's
25 not a period there. It goes on.

1 **THE COURT:** No. My reasoning wouldn't work. If there
2 was a period there and they didn't have the next phrase --

3 **MR. RHODES:** Look at the next phrase with me, Your
4 Honor.

5 **THE COURT:** I'm just saying --

6 **MR. RHODES:** Yeah.

7 **THE COURT:** -- if there was a period there and you
8 didn't have the next phrase, then you could bring a claim
9 against an Internet service provider for peonage or
10 transporting slaves or the other things that fall within the
11 chapter. But that's not what they did. It's not --

12 **MR. RHODES:** They --

13 **THE COURT:** So a period wouldn't change it.

14 **MR. RHODES:** But the phrase is *conduct*. I think this
15 is important. It doesn't say if the elements -- it says *if the*
16 *conduct underlying the claim*. So the thing that has to be
17 satisfied is you have to demonstrate the conduct of the claim
18 has to say 1591. They repeated that a second time in subpart B
19 for carving out state criminal prosecutions.

20 My argument is, if they had intended to allow claims at
21 the lower intent or, as you call it, the lower *mens rea* level
22 under 1595, which is the *known or should have known* standard,
23 why are they specifically saying the conduct has to satisfy
24 1591?

25 The one case that dealt with that directly is *Kik*. They

1 conclude that we were correct and Your Honor's construction is
2 not correct. I accept that that's not binding on you. But
3 what I'm saying is, if you look at the language, why would they
4 repeat that phrase *if the conduct*?

5 Then if we go to 1591, Your Honor, it says the conduct has
6 to satisfy 1591, twice in 1591, both in sort of the very
7 beginning of subpart A, where it says *whoever knowingly*, and
8 then you've got the 1 and 2 claims. The 2 claim, as you point
9 out, which is the one that we would attach to here, in the
10 definition of participation and venture, we once again find the
11 word *knowingly*.

12 So I think the architecture of the statute is very clear
13 that they were trying to identify a class of websites. We know
14 what they were because, remember, before this amendment
15 Backpage and others were getting off the hook on 230, and they
16 tried to design something.

17 But they used the phrase *knowingly* in the statute in 1591
18 twice, and then they say you've got to satisfy the conduct of a
19 1591 claim. They don't say the conduct of a 1595 claim.

20 And I argue that you're making that second phrasing --

21 **THE COURT:** They couldn't say conduct satisfying a
22 1595 claim because conduct satisfying a 1595 claim would go
23 beyond -- would go beyond sex trafficking.

24 **MR. RHODES:** I agree with you. But I'm just saying
25 if -- if the only claim that survives in this context -- in

1 fact, you know, the *Kik* case says this explicitly. They say
2 explicitly, in the sex trafficking context the only claim that
3 gets to be brought against an interactive computer service is a
4 1591 claim, and you have to show knowledge and overt acts. And
5 the complaint doesn't allege knowledge and overt acts here.

6 And, for one thing, a 1591 claim has a very interesting
7 subpart which has a temporal aspect to it. If you look at
8 subpart 3, you asked about commercial sex acts in your
9 preamble, and there it says it means *any sex act on account of*
10 *which anything of value is exchanged*, and then it goes on to
11 say the venture is -- and the syntax is important -- *knowingly*
12 *assisting, supporting, facilitating a violation*.

13 And if you look back to the original part of the
14 beneficial or beneficiary claim after subpart 2, there's
15 another unnumbered paragraph, okay. And it also uses the
16 phrase *knowingly*, and it talks about the minor being under 18,
17 and then it says *will be caused to engage*.

18 I mean, one of the elements that's missing here for a 1591
19 claim is not just the knowledge and the overt acts and any
20 connective tissue between just posting the video generally and
21 boosting it generally -- which *Gonzalez* says is not enough
22 under a nonFOSTA case -- but you have this temporal aspect that
23 your action is going to cause this to occur in the future.

24 So our argument is --

25 **THE COURT:** Well, not necessarily your action. The

1 venture --

2 **MR. RHODES:** The venture, correct.

3 **THE COURT:** -- will cause it to occur in the future.

4 **MR. RHODES:** I agree with that.

5 **THE COURT:** And I guess the argument on the venture
6 is, well, you know, that's what child pornography is all about.
7 Posting leads to reposting, leads to trading, leads to selling
8 of this, and that's the commercial sex acts that occur
9 naturally in the future from the first posting and from the
10 second posting and from the third posting.

11 Why isn't that enough for a commercial sex act?

12 **MR. RHODES:** Because they're talking about
13 participation in a venture, and that has been construed by the
14 cases as to having some connection. It's not necessarily a
15 conspiracy per se.

16 But here Twitter doesn't know who these people are.
17 There's no allegation that we were aware of them. It's simply
18 the content. The content got posted, and it's the fact you
19 didn't take it down quickly enough despite, as you point out,
20 the several notices.

21 It's still the underlying content. You're treating this
22 as a (c)(1) publisher or speaker of the content. And we
23 believe it's very clear in the statute that the only claim
24 that's allowed to go forward is a 1591 claim, which requires a
25 specific level of intent.

1 And if you look at that *Afyare* case that we cite, *U.S.*
2 *versus Afyare*, which is sort of the benchmark for what is the
3 elements of the claim, it's knowledge that you're intending to
4 facilitate this activity.

5 This already took place. We're not intending to
6 facilitate it. The argument really is, you made an error in
7 judgment in not taking it down quickly enough. That's the
8 classic 230 situation. That's not a 1591 violation.

9 And I think the *Kik* case got it right when they point out
10 the 1595 claim was built for the offline world, the situation
11 where you've got the motel manager who's aware that the
12 trafficking is taking place on premises based on their
13 observations, and they talk about, you know, what you're able
14 to see. That's the *should have known* standard.

15 In the interactive computer service context, the only sex
16 trafficking claim that gets to go forward is one that meets the
17 strictures of 1591. And our argument is that does require a
18 level of intent that's higher than the *should have known*
19 standard in 1595.

20 Otherwise, why would Congress, in multiple sections under
21 the carve-out for FOSTA, why would they use the phrase *the*
22 *conduct of the claim has to satisfy 1591*? Why would they use
23 that phrase?

24 **THE COURT:** I think it's an interesting argument. And
25 we'll get the other side's response on it in a moment, but I

1 wanted to ask you one other question.

2 You were talking about the requirement that it cause to
3 engage in a commercial sex act regarding the venture.

4 So I guess you don't disagree that -- I'll put it in a
5 provocative fashion.

6 **MR. RHODES:** Yes, Your Honor.

7 **THE COURT:** You don't disagree that the -- you know,
8 leaving aside, for a moment, Twitter's intent with respect to
9 and knowledge with respect to the posting, but the posting of
10 child pornography falls within the definition of a conduct that
11 would cause plaintiffs to engage in a commercial sex act, you
12 don't disagree with that?

13 **MR. RHODES:** In the abstract, I can see your point.
14 What I'm saying on the facts of this case -- let me give you an
15 analogy.

16 **THE COURT:** There are two questions. One is in the
17 abstract and then Twitter's participation.

18 **MR. RHODES:** Yes.

19 **THE COURT:** That's a different question.

20 **MR. RHODES:** Yeah. I agree with you. I guess what
21 I'm hung up on is if you look at the most recent Ninth Circuit
22 articulation generally on 230, which is the *Gonzalez* case, they
23 specifically note in that instance that they accepted as a
24 premise that the platform was intentionally, as they put it,
25 intentionally recommending the offensive conduct, the

1 ISIS-created content, and that they were making it more easy to
2 see, more allowable. And they said that's not enough to get
3 you outside of 230.

4 I think the analogy holds here too. It's we have to have
5 an intent and knowledge that our action is facilitating the
6 violation of 1591, which has, as you point out, the commercial
7 sex trafficking activity, and the victims will be trafficked.
8 And I don't think that connection is made here on this record.

9 **THE COURT:** So why isn't it made? And I'm not sure I
10 agree that's the right way to look at the standard.

11 But why isn't it made by saying that you were told over
12 and over and over, in great detail, that this was child
13 pornography, the sources of the child's pornography, that it
14 was up there, that people who were posting it were child
15 pornographers? Why isn't that enough to take you out of that
16 exception?

17 **MR. RHODES:** Because you still have to show a
18 connection between your knowledge and the intent -- in the
19 venture definition, the second knowingly assisting the venture.

20 And what you've got here is in the language of the
21 original 230 case, *Zeran*, the *Goddard versus Google* case, and
22 that *Vimeo* case, I believe, out of the Second Circuit, they all
23 say perfection is not the standard.

24 So I think the record shows, Your Honor, that they took it
25 down after nine days. And the totality of the circumstances

1 are clear that Twitter does not want this kind of content on
2 its website.

3 Under *Gonzalez*, we're not treating -- there's no
4 allegation that we treated this content specifically different.
5 It's you've got to do more than just have general platform or
6 that somehow you make money generally on content on your
7 platform. We dispute that it's all content, but that's what
8 they allege.

9 And the point I'm making is, if you look at the cases
10 going back to even *Zeran* and even the Congressional intent, as
11 in the language of the Ninth Circuit in *Gonzalez*, Congress
12 didn't differentiate between criminal, dangerous, or obscene
13 content from innocuous content.

14 The question presented is, is my failure to retract the
15 offensive material, is my failure to retract over a nine-day
16 period, is that enough to satisfy the intent element of 1591?

17 Now, if you disagree with me as a threshold matter, if you
18 disagree with me that the only claim that can survive is one
19 built on 1591, as the language says, based on the conduct that
20 satisfies 1591, and you say that notwithstanding that we can
21 satisfy the claim by looking at 1595, then, yeah, I understand
22 that I'm more in trouble with you on that point.

23 But I think that's legally wrong, Your Honor, for the
24 textural language of the entire statute, the fact that the
25 first part is only limited to criminal prosecutions. And in

1 multiple places in the FOSTA carve-out they said even for state
2 criminal prosecution the only thing that gets by for an
3 electronic computer service is a claim that satisfies 1591.
4 And there's no dispute that 1591 has higher and more stringent
5 elements than 1595.

6 So the question is, so why is that the case? And what the
7 *Kik* case says is that the only commercial sex trafficking
8 activity that gets laid against an online computer service like
9 this is 1591. And 1595 is meant to pick up the real world, the
10 non-online world of sex trafficking, and that's what those
11 hotel cases talk about.

12 That's the argument we're making, Your Honor, as the
13 gating item. And, frankly, for me to win, you have to accept
14 that as a paradigm, and I understand that.

15 **THE COURT:** Okay. I get it. I get it. I get it.

16 So can you -- while I've got you, before I go to the other
17 side, and you can say anything else you'd like to, as well,
18 would you tell me a little bit about the relationship between
19 views and re-tweets and ad revenue for Twitter? I mean, I have
20 to go by the pleadings, but I am interested in how that
21 actually works.

22 **MR. RHODES:** Right. So there's sponsored tweets,
23 which are based algorithmically filtered, if you're looking at
24 a feed on a certain subject matter and then, simplistically
25 put -- and my apologies to my Twitter colleagues who are on the

1 Zoom. I'll probably get this wrong.

2 But in concept, the company has sponsored tweets. People
3 have paid for those tweets to get to your eyes, if you will.
4 And it's basically kind of content matching.

5 Now, what's interesting here is another one of our
6 arguments, one of our sub arguments here is -- and *again*
7 *Gonzalez* helps us understand this -- just because you have a
8 platform that monetizes user-generated content, including
9 dangerous, offensive, and criminal content, doesn't mean that
10 that takes you outside of the immunity; right. It has to be
11 more than that.

12 So, for example, there's no allegation here that there was
13 a sponsored tweet for this content or that Twitter did anything
14 knowingly with respect to this particular content.

15 The allegation appears to be that, well, the content was
16 there, there was 171,000 views of it; and, therefore, that
17 monetization, if you will, to the extent there was a
18 monetization there, it may be indirect in the sense there was
19 more overall user engagement or something on the platform.

20 And, I think, if you go back and look at *Gonzalez* it's
21 very interesting because they talk about the monetization
22 concept, and they say just because -- even when you're kind of
23 boosting content or making it easier to find or easier to see
24 in the language of that case, it's not enough to take you out
25 of the 230 harbor. You have to kind of entwine yourself with

1 the specific content for that principle to attach here. It's
2 not enough to just simply say, you know, you're making money
3 because there's content.

4 And the reason I say that is you go back to the
5 legislative history -- look, I understand that's always a
6 dangerous argument for lawyers to make; right. But if you look
7 at what motivated this and look at the congressional record,
8 they were talking about a specific set of websites, where the
9 entire website was designed to facilitate sex trafficking.

10 I argued these cases a lot before 2018, and I would always
11 have judges tell me: I'm really disturbed by your citation to
12 the Grinder case or the Backpage case where the entire website
13 was designed with tools to anonymize conduct, make it hard to
14 find people, use coded language, facilitate payments, and all
15 those things.

16 Twitter is obviously meant to be a benign platform; right.
17 May not like some of the content, but it's meant to be a benign
18 platform. They move heaven and earth to try to get this kind
19 content off of it. What you can say here is, at best, someone
20 may have made a human error, and it was up for nine days.
21 Okay. But that is a fundamental publisher function, trying to
22 retract offensive material.

23 And *Zeran* and *Goddard* and *Vimeo* and other cases say, look,
24 we understand we're not going to get perfection. So if we're
25 going to take your immunity away, if we're going to take it

1 away, we're going to require more engagement with the
2 particular offensive content.

3 Go back to that *Kik* case. They talk about this. They
4 said the same thing there. And remember, in *Kik* the
5 trafficking took place on the *Kik* platform. The allegation
6 was: You know those people are there; they met the victim
7 there; they contacted the victim there; they used your service
8 to connect with them and then get them to engage in the
9 trafficking off the platform.

10 And the Court said, yeah, but your venture is all about
11 just the generic money-making machine of that platform, that
12 user engagement drives economic uplift. And the Court said
13 there's no allegation that *Kik* intended to facilitate the
14 trafficking of that particular person or to engage in an
15 economic relationship with the perpetrators who were targeting
16 that particular person.

17 And that's what 1591 captures differently than 1595. And
18 that's why the gating concept I've given you suggests that
19 that's the right way of thinking about it, because you're still
20 trying to motivate these platforms to do the right thing and
21 self-police. But they're not going to get it right every time.
22 And so if you take the immunity away because they screwed it up
23 in one instance like this, it becomes very challenging to the
24 underlying architecture of the whole thing.

25 And so we would argue that it's more than just you make

1 money because there's content and people are eyeballing it.
2 There's no allegation that I was trying to target Judge Spero
3 particularly and get people to look at Judge Spero's content
4 and make additional money on Judge Spero or, as Twitter does,
5 license data about Judge Spero, and so on and so forth.

6 It's really, if you look at it, the complaint says you
7 make money by having this kind of content there. And if the
8 issue is we're knowingly acting, then why are we trying to take
9 down 400,000 accounts all the time?

10 I think what you really have here is you have that old
11 adage bad facts can lead to bad law. It's a tough fact
12 pattern. I get it. But it doesn't change the fundamental
13 analysis that we had nothing to do with this other than
14 allowing it to be up there for nine days and didn't -- if the
15 Court accepts the plaintiffs' argument, didn't respond as
16 accurately and fast as we should have to the takedown notices.

17 It's still a retraction function. It's still the
18 quintessential publisher behavior.

19 **THE COURT:** Thank you very much.

20 Let me talk to the other side a little bit. I want you
21 all to respond to what Mr. Rhodes has said, in particular in
22 addition to the *Gonzalez* case and the recent Ninth Circuit
23 opinions.

24 He says two things that resonate somewhat with me, and
25 that is, in FOSTA the reference using the same language in the

1 next subpart, in subpart B for state criminal proceedings, it's
2 a -- he suggests that that way of doing it means that they
3 really meant it as a limiting feature in the way that Twitter
4 is arguing. And, secondly, that it refers to conduct
5 satisfying the elements of 1591, and that that is another --
6 additional evidence that they really meant to confine what was
7 encompassed within the allowable 1595 claim.

8 So if you would address those as well as the other things
9 that Mr. Rhodes stated and the things that I wanted stated, I
10 would appreciate it.

11 **MR. GENTALA:** Thank you, Your Honor. My name is Peter
12 Gentala, again, for the record --

13 **THE COURT:** Welcome.

14 **MR. GENTALA:** -- and I represent the plaintiffs.
15 Thank you.

16 Also with me is co-counsel Lisa Haba, and we had designed
17 our presentation so that I would speak to the trafficking
18 issues and Ms. Haba would essentially speak to the balance of
19 the claims in the complaint. And I'm also prepared to speak to
20 2258A, which you've already indicated in your tentative that
21 you've made a tentative decision on.

22 We would be -- we'll go straight to the Court's concerns,
23 but we would like to be heard, if there's time, on some of
24 those issues that are outside of the tentative order.

25 **THE COURT:** Of course.

1 **MR. GENTALA:** Turning, Your Honor, just to your first
2 question, where you asked about the commercial sex act and
3 whether child sex abuse material -- and, with the Court's
4 permission, I'll just use that term. I understand that the
5 term in the statute is *child pornography*, but the parlance in
6 the field is to really focus on what it actually is because it
7 does constitute a crime.

8 And the definition of the commercial sex act is any sex
9 act on account of which anything of value is given to or
10 received by any person. There's a lot of *anys* in there, Your
11 Honor. That's broad language. Congress has swept,
12 essentially, any sex act where there's a knowledge component in
13 there.

14 So it's absolutely the case that child sex abuse material
15 can constitute a commercial sex act and that a commercial
16 benefit can be received from it after the fact. The whole
17 point to child sex abuse material is that it's harmful in its
18 inception, but then it is also devastatingly harmful as it
19 continues to be spread over and over again, so much so that the
20 mere possession of it is criminalized.

21 So what we have here -- I heard what Mr. Rhodes said, and
22 I saw in the papers their argument about *any person*. But the
23 relative phrase in these sex trafficking laws is not *any*
24 *person*, it's whoever commits one of the acts, let's say
25 maintaining or facilitating, and then it's *by any means a*

1 *person.*

2 And the means that has been used here is by a digital
3 creation and then recirculation of an abusive sex act that has
4 been committed against them.

5 **THE COURT:** You have to go back to the language of the
6 statute. The question is whether one recruits, entices,
7 harbors, transfers, provides, obtains, patronizes, or
8 solicited, right, a person. And I'm wondering how this can be
9 that direct thing when Twitter has not done any of those
10 things.

11 You know, give them -- assume for the moment that they may
12 have some responsibility, ultimately, for not taking the
13 posting down, for after the fact getting some benefit from it,
14 et cetera, et cetera. I'm still troubling -- you're talking
15 about the direct claim under (a)(1), I assume, that how that
16 could be that they've actually done one of these things with
17 respect to a person.

18 **MR. GENTALA:** Your Honor, really, the commercial sex
19 act element is there in both the direct and the benefiting
20 claim under (a)(2).

21 But that predicate term *maintained* is in the direct
22 portion. And the maintaining here would be at the point of
23 knowledge, once Twitter knows that this child sex abuse
24 material is on its platform. And then we have in the record
25 paragraph 120, Twitter writing back to one of the victims and

1 saying: We've reviewed the material; it doesn't violate our
2 policies; it's going to stay up on our website. So that's the
3 maintaining.

4 But I understand we're going through the lens of 1595 and
5 that the standard is through that, and we agree with what
6 you've been saying about the knowledge standard that's from
7 there.

8 Your second question, I think, really gets to the
9 economics of Twitter and the value that can come from a
10 commercial sex act.

11 And here, Your Honor, I think it's important to note,
12 first of all, there was substantial user engagement with this
13 child sex abuse material. The numbers that we were able to
14 document for the purpose of the First Amended Complaint, the
15 167,000 views, 2200 re-tweets, 6600 likes, that's all just
16 after two days after it was reported to Twitter. It was active
17 at least another seven days on the platform. So we really
18 can't tell, but it's a very, very substantial engagement with
19 the users.

20 And what does Twitter say to the business community, to
21 its investors, to the public, about the way it conducts its
22 business? Simply stated, Twitter says, by its own description,
23 that it receives value from every account and every post on its
24 platform. And whether that turns into immediately hard
25 currency and when it gets converted into revenue is not the

1 question because it's anything of value.

2 So look at, for example, just to give you a few paragraphs
3 that you can look at later, paragraph 31, in a letter to
4 shareholders Twitter says:

5 "Using our proprietary algorithms and understandings
6 of the interests of each account, we can deliver promoted
7 tweets that are intended to be relevant to a particular
8 account."

9 Again, paragraph 41 talks about an active usage model that
10 Twitter has put together to help its prospective business
11 partners and advertisers understand daily activity. That's the
12 monetizable daily active usage program.

13 They're basically saying every account matters every day,
14 and we can track what happens on a use-by-user basis and on an
15 account-by-account basis. That's value to Twitter, which they
16 turn around and turn into value in the marketplace.

17 And then, finally, paragraph 32, this is what Twitter
18 tells not advertisers and businesses but users themselves,
19 quote:

20 When you use Twitter to follow, tweet, search, view or
21 interact with tweets or Twitter accounts we may use these
22 actions to customize Twitter ads for you. Unquote.

23 And it goes on at some length describing for users what it
24 is for the purpose of users appreciating how they track that
25 data.

1 Now, I heard Mr. Rhodes say that what there should be is
2 proof that this particular CSAM was monetized. And that is not
3 in the statute. The statute focuses on anything of value. And
4 from the point of time that Twitter knew that that child sex
5 abuse material was on its platform, it also knew or should have
6 known that it was receiving value from it. And the amount of
7 user engagement that we have pointed to, to the Court,
8 demonstrates that.

9 So that's the commercial benefit side. It does not --
10 it's not a transactional transaction-by-transaction benefit.
11 It's anything of value, whether it's monetary or otherwise.

12 And just to give you one example, many courts have held,
13 for example, that offenders in the child pornography space
14 receive something of value when they just get the image,
15 because it's valuable to them for their own personal
16 possession, whether they convert that into currency afterwards.
17 So that's the kind of value that we're talking about overall.

18 I just want to mention, the reference to the *Kik* case and
19 the *mens rea* with 1595, I think the -- you know, the relative
20 analysis there that was done by Judge Freeman in the *BM* case
21 and Judge Orrick in the *JC* case, both of which are in the
22 pleadings, in the papers before you, point out that basically
23 the argument that Twitter is making here would completely
24 nullify the *should have known* standard that appears in 1595.
25 And at the pleading stage, here you have two different judges

1 that have said they're not prepared to do that.

2 **THE COURT:** I understand. I have to decide for
3 myself.

4 And I want you to address the two arguments that he
5 brought up, that I hadn't focused on in as great a detail, and
6 that is the language that he says changes the *mens rea* from the
7 1595 standard to the 1591 standard in FOSTA is the same in
8 subpart B for state criminal prosecutions, suggesting that they
9 intended to limit those things in the same way. And the only
10 way you can understand that if they're in the same way is if
11 it's the same kind of limitation; and, secondly, the reference
12 to conduct.

13 But those are the two things I need you to address that
14 Mr. Rhodes mentioned on this *mens rea* part.

15 **MR. GENTALA:** Sure. So the context is a
16 sex-trafficking-focused piece of legislation. So your take is
17 correct that what Congress was doing was coming in and carving
18 out sex trafficking from the rest of the Trafficking Victims
19 Protection Act, which focuses on employment trafficking,
20 peonage, et cetera. And so that's how they're singling that
21 out in the language of FOSTA, they're focusing on it has to be
22 a violation of a 1591 claim that is the initial conduct.

23 I want to point out something here. The conduct doesn't
24 necessarily have to be Twitter's. In fact, in this case the
25 initial conduct was not Twitter. It was the initial trafficker

1 who trafficked these young men. And then there were subsequent
2 traffickers who posted the material onto the Twitter platform.
3 We don't know who they are.

4 But what Congress accomplished in FOSTA was by
5 specifically noting 1595, which has the *should have known*
6 standard in there. It was allowing trafficking victims to come
7 forward and basically have access to discovery so that they
8 would have a chance to prove a claim when it's predicated on an
9 original 1591 violation.

10 **THE COURT:** So you're not answering my question. My
11 question is, what about the fact that subpart B for state
12 criminal prosecutions has the same language? That's the
13 question.

14 And I think the argument is -- and I'm just making it up
15 off the top of my head; Mr. Rhodes will correct me when I'm
16 wrong -- is that you don't think that in putting it in subpart
17 B for state criminal prosecutions, do you, that if the state
18 criminal prosecution had a lesser standard, it had a lesser
19 standard for conviction of a sex trafficking crime than was
20 required for 1591, that the state could still prosecute someone
21 and the immunity would go away, do you?

22 And if you agree with me on that or you agree with
23 Mr. Rhodes on that, then it's the same language with respect to
24 the subpart regarding 1595. So that's, as I understand it, the
25 issue with respect to it's the same language in two subparts of

1 FOSTA and how can you square your view of it with the second
2 subpart.

3 **MR. GENTALA:** I understand. Thank you.

4 I don't think -- I think it's an apples-and-oranges
5 comparison or analogy. Here we have Congress specifically
6 pointing to a civil cause of action statute that rests on top
7 of the criminal statutes.

8 And it would be a different matter if Congress also
9 decided to point out state civil causes of action that could
10 work in the sex trafficking area where they're creating civil
11 causes of action. But that's not the case there. So --

12 **THE COURT:** No, but did --

13 **MR. GENTALA:** -- alignment on the criminal side and
14 civil side -- sorry.

15 **THE COURT:** Maybe I'm not being clear.

16 Assume with me when the Congress says what you say they
17 say, that when they say that the conduct satisfying the
18 elements of 1591, that that is not meant to restrict or in any
19 way change the *mens rea* requirement of the phrase that's before
20 it, which is the broader category of things that are allowed to
21 be brought, in the subpart we're talking about, that's 1595,
22 has a particular *mens rea*. And it's not Congress's intent by
23 saying so long as the conduct meets the elements of 1591 to
24 change the *mens rea* requirement of 1595. That's your argument.
25 That's the point.

1 If you go into subpart B, where it says you can proceed
2 with state criminal prosecutions, and then says so long as, et
3 cetera, et cetera, et cetera, what's the implication for that?

4 If we go with what you're saying, then if a state has a
5 criminal prosecution for sex crimes that has a lower *mens rea*
6 than 1591, that it doesn't -- state criminal prosecution is
7 allowed; right? The state criminal prosecution is allowed even
8 though it has a lower -- I think that's the way the argument
9 goes -- a lower *mens rea* than 1591. That would be your
10 argument.

11 But that seems like an odd thing in the criminal context,
12 when they said the conduct has to fall within a criminal
13 statute to be accepted and allowed for a criminal prosecution
14 in the state area.

15 I mean, that's the argument, in any event.

16 **MR. GENTALA:** I understand. It is an odd -- it would
17 be odd, and Congress didn't do that. Congress has a specific
18 civil carve-out here.

19 And so when I see the -- I don't understand why when
20 Congress moves in with a scalpel and focuses on a specific
21 civil cause of action in federal law and then in a separate
22 vein moves over to talk about the kind of criminal *mens rea*
23 that would apply on the criminal side of things, why the two
24 are completely linked together or would have to be linked
25 together.

1 That phrase *if the conduct underlying the claim*
2 *constitutes* really is very similar to what we're talking about
3 in 1595, where there's a victim of the chapter and -- and they
4 knew or should have known that they have engaged in an act that
5 is in violation of the chapter.

6 And so Congress is saying, among this chapter let's focus
7 on 1591, and if there is a 1591 claim then we can focus in
8 specifically on the state of knowledge, and we're going to give
9 a civil plaintiff the benefit of the *should have known*
10 standard.

11 Your Honor, I don't want to get lost with that because we
12 believe that we satisfy the direct knowledge standard --

13 **THE COURT:** No, I appreciate.

14 **MR. RHODES:** -- and, certainly, the reckless disregard
15 standard as well.

16 **THE COURT:** Yeah.

17 **MR. GENTALA:** Your Honor, I had a point about
18 participation in the venture and the *Afyare* case. Are you
19 satisfied with our discussion of following up on Mr. Rhodes's
20 points?

21 **THE COURT:** Yes, I think I am. I think I need you to
22 finish up your argument though. I've got a -- unfortunately,
23 I'm doing the criminal calendar for the district for -- the
24 morning criminal calendar for the district, and I need to get
25 to that pretty soon. But I want you to finish up your argument

1 and make any additional arguments you wanted to make pretty
2 quickly if you could.

3 **MR. GENTALA:** Sure. I'll be very brief then.

4 With regard to participation in a venture, the *Afyare* case
5 is of no value because it was decided by the Sixth Circuit in
6 2016 before Congress conveyed a specific definition for
7 participation in a venture.

8 Congress included that in the package of changes that were
9 made with FOSTA-SESTA in 2018. So *Afyare* is not -- I saw it
10 called, a couple of times in the pleading, a seminal case.
11 It's a case that really doesn't provide any value when it comes
12 to participation in the venture.

13 With regard to the nexus between sex trafficking and
14 sexually explicit photos and videos, one case that wasn't in
15 the pleadings, that addresses a specific offense made by a
16 criminal defendant under 1591, is *United States versus Marcus*.
17 That cite is 487 F.Supp.2d 289. 487 F.Supp.2d 289.

18 And there you have a criminal defendant making the
19 argument you need a tangible person and it doesn't apply to
20 pornography. And the Court rejects that defense in the context
21 of 1591. And the Court specifically notes that when the
22 Trafficking Victim Protection Act was passed in 2000, among the
23 congressional findings was a concern about sexual exploitation
24 through pornography. And that's with the *Marcus* case.

25 With regard to this concept *will be caused*, that the verb

1 tense matters there, it's broad language. And as the Court's
2 have looked at 1591 and -- both direct and beneficiary
3 trafficking, they have ruled that it's broad enough to cover
4 even when a sexual act has not yet taken place, even if it
5 never takes place, even in police sting situations where there
6 is no minor.

7 But here we have the children. The initial sexual act has
8 taken place, and the commercial sex act was ongoing on the
9 Twitter platform, and Twitter had knowledge of that and left it
10 there.

11 And without the benefit of discovery, we won't know the
12 full footprint or the impact of that. It still may be there
13 now for all we can know. But we need to have a chance to get
14 to the bottom of these issues under the trafficking statute.

15 With that, Your Honor, I just want to give my co-counsel a
16 chance to raise any issues touching the balance of the
17 complaint.

18 **THE COURT:** That's fine. But I do -- please make it
19 as concise as you can.

20 **MS. HABA:** Your Honor. Lisa Haba on behalf of John
21 Does 1 and 2. Thank you for your time, Your Honor. I'll be
22 brief.

23 I'm going to talk about three of our other causes of
24 action very briefly. The first one being 2252A and 2255, the
25 second one being the common law claims, and the third being the

1 product liability.

2 We believe that all three of them -- I know Your Honor's
3 preliminary ruling was they fall outside. Within CDA 230, we
4 would respectfully assert they fall outside CDA 230 for the
5 following. I'm going to talk first about the 2255. This deals
6 with child pornography.

7 **THE COURT:** So can I ask you a question?

8 **MS. HABA:** Yes, sir.

9 **THE COURT:** With respect to 2255A and B, I said
10 there's no cause of action for those claims. No private right
11 of action. What's your response to that?

12 **MS. HABA:** There is a cause of action for 2255 and
13 2252A.

14 2252A created a cause of action in 2255. That was created
15 when the civil cause of action came into existence in 1998,
16 under the Children From Sexual Predators Act of 1998, and
17 that's when 2255 created the civil remedy.

18 So that was two years after CDA 230 was codified.
19 Congress, knowing of CDA 230's immunity provision, then
20 codified the civil cause of action allowing child pornography
21 to come into effect.

22 It's referred to as Masha's law as the common phrase
23 that's being used throughout the circuits.

24 **THE COURT:** Okay.

25 **MS. HABA:** Under Masha's Law, in that civil cause of

1 action, we're dealing with a unique situation that's not been
2 addressed and would be a matter of first impression here in the
3 Ninth Circuit.

4 Matter of first impression would be the following. There
5 are a couple of cases that deal with CDA 230 immunity. None of
6 them deal with child pornography. And it falls outside of that
7 because in other situations all the other scenarios that we've
8 been talking about in the case law and the jurisprudence deal
9 with matters of discussing different criminal activity.

10 This is criminal activity. Trading child pornography on
11 Twitter's platform is criminal activity. They're participating
12 in criminal activity as opposed to discussing it.

13 For example, if you said, I'd like to sell you drugs on
14 Twitter's platform, and there's a conversation about that, and
15 the drug sale takes place offline, that's a very different
16 scenario than actually trading the illicit, illegal material
17 through the platform. And Twitter, when they acknowledge that,
18 becomes a part of that crime.

19 When they allowed --

20 **THE COURT:** So is there any case law that says that?
21 I mean, for example, is there a case that says if you post --
22 if you're a person with security clearance and you post
23 national security information on Twitter, Twitter is
24 responsible because the act of posting that is itself a crime?

25 **MS. HABA:** To my knowledge, Your Honor -- and I've

1 looked ostensibly for a case that would say that -- I don't
2 think there is one.

3 **THE COURT:** So what about that source? So you think
4 that if somebody gets on Twitter and posts something that's a
5 crime, Twitter is responsible for it?

6 **MS. HABA:** If they have knowledge. So Twitter got --
7 I don't think it's in a vacuum. I don't think it's a scenario
8 where --

9 **THE COURT:** Okay. So they have knowledge. They're
10 told about it, and nine days later they take it down,
11 hypothetically. Do you think they can be held liable, that
12 there's a civil or criminal claim against them for that?

13 **MS. HABA:** Well, there's a middle piece that makes it
14 the civil liability. That's when they reviewed it and they
15 chose not to remove it. They made a definitive act to say, I
16 refuse to remove this, I refuse to act on this, with the full
17 knowledge of the criminal context of what I'm looking at. And
18 I refuse to act, allowing it to continue to be distributed by
19 my platform, knowing that this criminal material is being
20 distributed and knowing that I'm profiting from it.

21 With those facts in mind, yes, there is civil liability
22 for them, and that -- we have adequately pled that in our
23 pleadings.

24 **THE COURT:** Okay.

25 **MS. HABA:** The authority I would state to is in the

1 *Roommates* case, Your Honor. *Roommates* has two pieces in it
2 that I think are very instructive on this.

3 On page 1164 they say that unlawful conduct, when posed
4 face to face or by telephone does not magically become lawful
5 when accessed electronically online. The communications
6 Decency Act is not meant to create a lawless no man's land on
7 the Internet.

8 In the same *Roommates* case, the Ninth came forward and
9 talked about in the context of discussing 230 immunity. And
10 they came down on the district court and they said this is not
11 a blanket immunity. This is absolutely not something that
12 should be across the board if it's online we can't touch it.

13 They actually found fault with the district court for
14 doing that. And that's going to be cited on 1175 in the
15 *Roommates* case. And what the line says, when Congress passed
16 Section 230, it did not intend to prevent the enforcement of
17 all laws online. There's no case in the Ninth that says child
18 pornography is permissible to be traded and be given immunity
19 of any kind for participating in criminal conduct.

20 And I think another piece of *Roommates* that's incredibly
21 important is that they talk about: We believe, in the context
22 of discussing total immunity versus participating in criminal
23 conduct, the message to website operators is clear. If you
24 don't encourage illegal content, you will be immune.

25 We believe this distinction, again in the context of legal

1 versus illegal participation, is consistent with the intent of
2 Congress to preserve the free-flowing nature of Internet speech
3 and commerce without unduly prejudicing the enforcement of
4 other state and federal laws.

5 Well, Your Honor, Twitter violated the criminal laws that
6 prohibit the distribution and possession of child pornography.
7 At the very least, when Your Honor is interpreting this, at the
8 moment it was uploaded to their platform they were in
9 possession of child pornography. Every single time it's been
10 re-tweeted at a massive rate and scale this rampant
11 distribution of child pornography has been their distribution
12 of child pornography.

13 **THE COURT:** Well, but they clearly don't meet the *mens*
14 *rea* at that point in time; right?

15 **MS. MOHR:** Correct. But then there was a point in
16 time when John Doe's mother and himself contacted them and said
17 this is happening. And they responded back and said --
18 acknowledging their *mens rea*, and said, we know; we see this;
19 we've reviewed the material, and we refuse to remove it. And
20 that's at the moment when they are not only possessing and
21 redistributing child pornography with full knowledge, in
22 violation --

23 **THE COURT:** No, I appreciate that. I'm very troubled
24 by the idea that there's some distinction between civil and
25 criminal here.

1 So did you have something else you want -- because I've
2 got a bunch of people on the criminal calendar that are waiting
3 to get on, including, I hope, the jail.

4 **MS. HABA:** No, I appreciate that. And if you can
5 indulge me, very, very brief, I'd like to talk very briefly
6 about the CDA 230 immunity provision.

7 I think it's very important just to look at the language
8 of the statute. We talk about Twitter being either a publisher
9 or a provider.

10 In the provider context, they only get immunity if certain
11 predicate acts are met. Those predicate acts being they have
12 to take a voluntary good-faith act to restrict material or they
13 have to have -- they have to basically take certain actions.

14 Well, Twitter has alleged that they acted in good faith
15 and that they took voluntary good-faith acts, but there is no
16 evidence in the pleadings that --

17 **THE COURT:** I know. Mr. Rhodes is relying on the
18 publisher immunity.

19 **MR. RHODES:** Yes, Your Honor.

20 **THE COURT:** He's not relying on that for this
21 pleading.

22 **MS. HABA:** Okay. Well, then, I'll address the
23 publisher immunity very briefly as well. Publisher immunity is
24 as follows. There was --

25 **THE COURT:** I know what the publisher immunity is.

1 If you have a specific thing you want to argue about a
2 specific cause of action you should do it because I'm going to
3 cut off the argument in about two minutes.

4 **MS. HABA:** Yes, Your Honor. I will move on to the
5 products liability claim, and then I'll be finished, Your
6 Honor.

7 Our products liability claim does not fall under CDA 230
8 either. Our products liability claim talks about the actions
9 of Twitter itself. Twitter created an algorithm, an API, and a
10 software network that creates the Twitter and Twitter
11 platforms. That is the product that they created, and, as
12 such, they have a duty to create a safe product that's fully
13 independent of different things within it that would cause
14 danger to its users.

15 Let's talk about what we've pled in terms of --

16 **THE COURT:** Why doesn't that swallow the immunity?

17 So every single provider of this sort has a platform and
18 has algorithms, and so anytime anybody puts on offensive
19 conduct that hurts someone -- that's the definition that needs
20 to be here for products liability -- they can always say it was
21 the way you designed the platform and, therefore, there's no
22 publisher immunity whatsoever because there would never be
23 publisher immunity.

24 **MS. HABA:** Well, publisher immunity talks more about
25 what the third parties are posting on the platform. What I'm

1 talking about is actual creation of the platform.

2 **THE COURT:** I know. I understand that. But your
3 clients were hurt by what was posted on the platform; right?

4 **MS. HABA:** Correct.

5 **THE COURT:** So that's a necessary part of the element
6 of the claim of products liability here; right?

7 **MS. HABA:** Yes.

8 **THE COURT:** As a result of the product, the structure
9 of this product, this material was allowed to be posted on the
10 platform; and, therefore, it hurt our client. Which it did
11 horribly. That's the claim; right?

12 **MS. HABA:** That is the claim as well as the way that
13 the product was manufactured --

14 **THE COURT:** No, of course. Of course.

15 **MS. HABA:** Yes.

16 **THE COURT:** But every provider has that flaw.

17 **MS. HABA:** Well, I can't say that. I mean --

18 **THE COURT:** I can. I can. Every provider has a
19 platform.

20 **MS. HABA:** Yes.

21 **THE COURT:** Every provider has algorithms. Every
22 provider that allows postings has algorithms that allow
23 particular posting or doesn't allow other particular postings,
24 or screens or doesn't screens. And if you do it so that it
25 allows something harmful to get on, say, for example, some

1 defamation that hurt someone terribly by saying something
2 completely false, or child pornography, or anything else, that
3 means any publication that hurts someone is evidence of a
4 product -- if it hurt someone, is evidence that the product is
5 dangerous, and there should be a product liability claim.

6 Why doesn't that swallow the publisher liability
7 completely?

8 **MS. HABA:** Well, I think it's a little bit different,
9 Your Honor, because the way the platform exists.

10 If we were just in a world where the publisher's
11 manufactured platform doesn't contribute to illegal content
12 being disseminated on their platform -- I'm not talking about
13 defamation, I'm talking about our separate scenario with child
14 pornography and illegal material -- if we're dealing with
15 something like that it's different and separate and apart.

16 I'll give you an example. We've alleged in our
17 complaint -- I believe it's paragraph 82 -- that there's a
18 search term feature. So users can create hashtags. Twitter
19 allows their algorithm to take those hashtags and pair it with
20 words to help a user find in their search term what they're
21 looking for.

22 So there are certain hashtags that are known for only
23 being related to child pornography. There's no other
24 legitimate purpose to them. So #megalinks is one such hashtag.
25 #S2R, send to receive, another one. When you type into your

1 search terms *#megalinks*, it gives you suggestions for how you
2 can find what you're looking for. It suggests pairing the
3 phrase *young* with *#megalinks*.

4 Twitter's algorithm also suggests pairing hashtag send to
5 receive with *#megalinks* so you can better find the child
6 pornography you're looking for, if you're the kind of person
7 looking for that material. That is an inherent defect on that
8 platform.

9 So John Doe 1 and John Doe 2, their image, against their
10 will, is put on this platform. Twitter is made aware of it.
11 Their inherent algorithms help people find it and view it. And
12 every view is a harm to our plaintiffs.

13 Furthermore, Twitter alleged in their own pleadings that
14 they had 500,000 times they removed child porn off their
15 employing last year. I think they meant it as a celebration of
16 good faith of what they're doing. But, in reality, what it
17 shows this Court is that they are inherently aware of the
18 dangers of their platform.

19 They had to remove it 500,000 times. And instead of doing
20 what's necessary to remove the hashtags that are only geared
21 towards child porn, to remove such search term pairings that
22 make it inherently dangerous to users, they've chose to
23 maintain --

24 **THE COURT:** But that's not relevant to your argument
25 about products liability, which doesn't have an intent element;

1 right?

2 **MS. HABA:** I'm sorry, I didn't hear that.

3 **THE COURT:** That's got nothing to do with your
4 products liability claim, because there's no intent element for
5 products liability.

6 **MS. HABA:** Well, it's not that there's no intent
7 argument, Judge. I think when they created it they have a
8 duty -- I mean, they obviously have a duty to protect their
9 users, to create a safe product.

10 And I think it goes to show that they're even aware of
11 their own danger in their manufactured product. They're aware
12 of their own danger in their algorithm, and they continue to
13 act on the status quo.

14 **THE COURT:** Okay. Anything else?

15 **MR. RHODES:** Your Honor, may I have 30 seconds to
16 respond?

17 **THE COURT:** When I'm done with Ms. Haba's argument,
18 you can have 30 seconds to respond.

19 Go ahead. Anything further?

20 **MS. HABA:** No, Your Honor. That would be my entire
21 argument. Thank you for your time.

22 **THE COURT:** Okay. Mr. Rhodes, 30 seconds.

23 **MR. RHODES:** I will be brief.

24 Let me read to you a passage from the *Kik* case. Again.
25 It's not controlling, but I think it's persuasive. Quote:

1 By its terms FOSTA did not abrogate CDA immunity for
2 all claims arising from sex trafficking. FOSTA permits
3 civil liability for websites only if the conduct
4 underlying the claim constitutes a violation of 1591.

5 And then the Court goes on to say you'd have to show the
6 defendants knowingly participated in the sex trafficking
7 venture involving her, the named plaintiff.

8 I would then refer you back to the *Gonzalez* case where
9 they say specifically that, quote, the publication involves the
10 decision to take down -- response to takedown. So takedown
11 notice decision-making is part of the publishing construct.

12 I will also then cite you the same case where they talk
13 about the carve-out in 23(e)(1) as being limited to criminal
14 prosecution. We cited the *Doe versus Barnes* case on your 2255A
15 arguments and why you're right there.

16 And then last, but not least, let me give you another cite
17 for what the knowledge requirement is in the Ninth Circuit on
18 1591. And this is a case called *United States versus Todd*, 627
19 F.3d 329. If you're interested in what the Ninth Circuit says
20 the standard is, you'll find it there.

21 You have correctly summarized to my adversary what our
22 argument is. We're saying they added that clause. I go back
23 to putting a period there before that other phrase. Why would
24 they say the conduct underlying the claim satisfies 1591, which
25 clearly has a higher level of *mens rea*, if they didn't mean it

1 for both civil claims in A and state law criminal prosecution
2 in B?

3 With that, Your Honor, I submit. And I appreciate your
4 time.

5 **THE COURT:** Thank you, all. Thank you, all, for your
6 argument. I very much appreciate the briefing and the argument
7 in this case.

8 I take it that -- just by listening to this argument, and
9 maybe I shouldn't take this, but there was suggestion that the
10 parties wanted to discuss whether or not sometime soon there
11 might be an appropriate time to have settlement discussions or
12 ADR.

13 It doesn't sound like we're there yet, but if someone
14 disagrees, I'd love to hear it. But it doesn't sound like
15 we're there yet.

16 **MR. RHODES:** I don't think we're there yet, Your
17 Honor, speaking on behalf of Twitter. And I'm also
18 disappointed that if you're going to be the adjudicating judge
19 I won't be able to come see you in that regard, because you're
20 very effective in that setting.

21 **THE COURT:** You know -- yeah, okay. Thank you.

22 Well, in any event, okay. So I'll get this order out.
23 I've got to look at a number of things again -- it will take a
24 little bit of time -- and then we'll get it out. I'm going
25 to -- and then we'll take it from there.

1 I'm going to set a case management conference 90 days out,
2 just as a protective matter. And then we'll -- and then we'll
3 see what we can do.

4 I guess, assuming that I sustain my tentative and say that
5 these allegations are insufficient under 203, with respect to
6 all of the claims, except that the -- the benefiting claim
7 under the TVPRA, I assume that plaintiff has alleged what they
8 can with respect to that, and there's no reason to give leave
9 to amend to cure the 203 problems with the remaining claims.

10 But I thought I'd ask you that one last question, either
11 Mr. Gentala or Ms. Haba.

12 **MR. GENTALA:** Your Honor, I'm not sure we could assume
13 that at this stage. For example, we did not talk about 2258A
14 and B. But there might be some allegations there that could be
15 added depending on how that works. I mean, there is a standard
16 that's in 2258B.

17 **THE COURT:** I mean with respect to the immunity. If I
18 say they're all barred by the immunity, what's your -- what's
19 your opinion on whether there's any way to amend it?

20 I don't want to go through this more than we have to. If
21 you think there are legitimate things one can add to this that
22 give more detail, that would show that all these other claims,
23 state law claims, are not subject to the immunity, then -- more
24 than what you've already said -- great. I think, just looking
25 at it, I didn't see that.

1 **MR. GENTALA:** Your Honor, I appreciate the question.
2 I think we'd just like to reserve the right to review your
3 order and see --

4 **THE COURT:** Well, all right. I may do it without
5 leave to amend. You know, if you've got a good argument on new
6 facts that could be alleged, why that would justify the filing
7 an amended complaint, you could bring a motion to that effect.

8 **MR. GENTALA:** And just one point. I understood the
9 Court that the 1591 direct trafficking claim would also be
10 barred, and there might be places there where we could add
11 allegations that could support our 1591(a) piece.

12 **THE COURT:** Maybe. But I think I'll handle that the
13 same way. If you find some facts that you can, you can talk to
14 Mr. Rhodes, meet and confer. If you can't reach agreement with
15 him on what you want to do, then bring a motion before me for
16 permission to file an amended complaint.

17 **MR. GENTALA:** Thank you, Your Honor.

18 **THE COURT:** Yeah, okay.

19 All right. Karen, 90 days.

20 **THE CLERK:** November 5th, at 2:00 p.m. Does that work
21 for the parties?

22 **THE COURT:** Does that work for everyone's calendars?

23 **MR. RHODES:** Yes, Your Honor.

24 **THE COURT:** Does that work for the plaintiffs?

25 **MR. GENTALA:** Just one moment, Your Honor.

1 **THE COURT:** Yeah, no problem.

2 **MS. HABA:** That works for my calendar, Your Honor.

3 **MR. GENTALA:** Yes, it works for mine as well.

4 **THE COURT:** Okay. Thank you, all.

5 So give me an updated joint statement one week in advance
6 of that. But -- and, otherwise, I'll get out the order in the
7 next, you know, 30, 45 days, and then we'll take it from there.
8 Okay.

9 Thank you, all.

10 **MR. RHODES:** Thank you, Your Honor.

11 **MR. MATIASIC:** Thank you, Your Honor.

12 (At 10:54 a.m. the proceedings were adjourned.)

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16 **CERTIFICATE OF REPORTER**

17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled matter.

19 DATE: Sunday, August 22, 2021

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21
22 

23 _____
24 Katherine Powell Sullivan, CSR #5812, RMR, CRR
25 U.S. Court Reporter